UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 28

CEDAR ROOFING, INC.

Employer/Petitioner

and **Case 28-UC-227**

LOCAL 162, UNITED UNION OF ROOFERS AND WATERPROOFERS AND ALLIED WORKERS, AFL-CIO[1]

Union

and

THE ROOFING COMPANY

Interested Party

DECISION AND ORDER

Cedar Roofing, Inc. (the Employer) filed a petition under Section 9(c) of the National Labor Relations Act, seeking to clarify the unit voluntarily recognized by the Employer on March 6, 2002,[2] by a determination that the unit does not include employees of The Roofing Company (The Roofing Company). Based more fully on the reasons set forth below, I will dismiss the petition because The Roofing Company existed at the time the Employer and United Union of Roofers, Waterproofers and Allied Workers, Local 162, AFL-CIO (the Union) entered into the voluntary recognition agreement, the parties did not seek to cover or include employees of The Roofing Company in their voluntary recognition agreement, and there is no claim that The Roofing Company came into existence since March 6, or changed the way it operated since that date so as to require inclusion of the

[1] The name of the Union is corrected to reflect its correct name.
[2] All dates refer to calendar year 2002, unless otherwise noted.

employees of The Roofing Company in the recognized unit. Additionally, the Employer's desire to obtain an adjudication of any single employer/alter ego relationship by and between the Employer and The Roofing Company through the instant petition is not a permissible use of a unit clarification proceeding.

DECISION

A. Background

On February 28, with the expiration of its most recent collective-bargaining agreement with the Employer, the Union filed a petition in Case 28-RC-6036, seeking to represent a unit of all full-time and regular part-time roofers. The petition listed the Reno, Nevada address of the Employer and did not otherwise indicate the locations of unit employees the Union sought to represent. The name of The Roofing Company was not set forth in the petition. On March 6, the parties entered into a voluntary recognition agreement by which the Employer granted Section 9(a) recognition to the Union as the representative of the following unit of employees:

> All full-time and regular part-time employees performing commercial roofing work, BUT EXCLUDING all other employees, office clerical employees, guards, and supervisors as defined in the National Labor Relations Act.

The recognition agreement does not specify the location or locations of the unit, nor does it name The Roofing Company. Having obtained voluntary recognition, the Union withdrew its petition.

B. The Unfair Labor Practice Charges

Following the execution of the voluntary recognition agreement, the Union requested certain information from the Employer by a letter dated March 29. The Employer

did not respond to this request. On May 20, the Union filed an unfair labor practice charge against the Employer in Case 28-CA-17950, alleging that the Employer had failed to provide the requested information and that the Employer had established The Roofing Company and failed to apply the Union's collective-bargaining agreement with the Employer to it in violation of Section 8(a)(1) and (5) of the Act. On July 23, the Union amended its charge to allege both the Employer and The Roofing Company as the employers against whom the charge was brought. It alleged further violations of Section 8(a)(1), (3), and (5) of the Act with the additional allegations that the Employer and The Roofing Company had ceased doing business, transferred work to The Roofing Company, discriminated against employees because of their union and other concerted activities, and unilaterally changed working conditions without bargaining with the Union. On September 3, the Union filed an unfair labor practice charge against the Employer and The Roofing Company, as joint employers, alter egos, and successors, in Case 28-CA-18160, repeating the allegations of its original and amended charge in Case 28-CA-17950, and adding the allegations that the Employer and The Roofing Company had repudiated the Union's collective-bargaining agreement with the Employer, that the Employer and The Roofing Company had closed the Employer or substantially reduced its operations without bargaining over the decision and effects, and that The Roofing Company had assumed the work previously performed by the Employer in violation of Section 8(a)(1), (3), and (5) of the Act.

The investigation of those charges disclosed that the Employer and the Union had previously entered into two collective-bargaining agreements, the first effective from September 8, 1997 to January 1, 1999, and the second effective from March 1, 1999 to February 28, covering journeyman and apprentice roofers and helpers of the Employer. The

investigation also disclosed that The Roofing Company has operated at all times since at least 1998, and since the Union established its collective-bargaining relationship with the Employer. Correspondence between the parties establishes that the Union was aware of the existence of The Roofing Company at least since 1998. At all material times, the Employer and The Roofing Company operated out of shared facilities in Las Vegas and Reno, Nevada, and, at times, used common employees.

The investigation further disclosed that the Employer closed its business in early October, while The Roofing Company continued to operate. The investigation failed to disclose sufficient evidence to establish either that the closure of the Employer's business was based on any unlawful motive or that the Employer's work performed by unit employees had been transferred to The Roofing Company. In sum, the evidence failed to establish that the Employer and The Roofing Company have operated as alter egos.

On November 25, the Employer entered into an informal Board settlement agreement in Cases 28-CA-17950 and 28-CA-18160. The settlement agreement covered the alleged failure of the Employer to provide certain requested relevant information to the Union and the alleged failure of the Employer to notify and bargaining with the Union over the Employer's closure. To date, the Union has declined to enter into this settlement agreement and the Regional Director has not yet approved the settlement agreement.

C. The Unit Clarification Petition

As noted above, the Employer filed this petition on October 9. The Region conducted an administrative investigation and, on December 6, issued a Notice to Show Cause to the parties giving them until December 12, to show cause why the instant petition should not be dismissed. On December 10, Counsel for the Employer submitted a letter in

response, with attachment. The attachment is a First Amended Petition to Compel Inspection and Audit of the records of the Employer and The Roofing Company filed in the United States District Court for the District of Nevada by the Union and certain trustees (the Trustees) of the Union's fringe benefit funds and apprenticeship training committee. The Union did not respond to the Notice to Show Cause.

D. The Employer's Position

According to affidavit evidence submitted by representatives of the Employer as part of the administrative investigation, the Employer filed the petition for "clarification of interest between the two entities, [the Employer] and The Roofing Company." In her affidavit, the Employer's president stated the petition was filed to: 1) have the Union drop its allegation that the Employer and The Roofing Company are the same company; 2) have the Union drop its lawsuit seeking a full audit of The Roofing Company's records; and 3) stop the Union in its attempts to extend its Section 9(a) recognition agreement with the Employer to The Roofing Company. By its letter in response to the Notice to Show Cause, the Employer urges that the Board has primary jurisdiction to resolve the single employer/alter ego issue involving the Employer and The Roofing Company, that a hearing on its petition will result in an adjudication of that issue, and that such adjudication will be binding upon the District Court in the audit lawsuit filed by the Union and the Trustees.

E. Legal Analysis and Determination

The Board has established stringent rules in the area of unit clarifications. In *Union Electric Company*, 217 NLRB 666 at 667 (1975), the Board described the function of a unit clarification as follows:

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example,

> come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category – excluded or included – that they occupied in the past. Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.

As discussed above, The Roofing Company existed at the time the parties entered into their first collective-bargaining agreement and continued to exist at the time the Employer and the Union entered into their voluntary recognition agreement on March 6. There is no evidence that the Employer or The Roofing Company changed the way either operated since March 6, so as to require inclusion of the employees of The Roofing Company in the recognized unit. Thus, the traditional factors supporting the processing of the instant petition are not present here, and I will dismiss the petition on that basis.

The Employer seeks a reaffirmation, through a hearing on the unit clarification petition, that The Roofing Company is an entity separate from the Employer and not subject to the terms of the voluntary recognition agreement between the Employer and Union. I conclude that this is an impermissible use of a unit clarification proceeding. In support of my conclusion, I rely on *Al J. Schneider & Associates*, 227 NLBR 1305 (1977). In that case, two unions represented the carpenters and painters of the employer, a general construction contractor engaged in new construction. The unions filed unfair labor practice charges against the employer, a retail lumberyard/building supply dealer and its operating division, contending that their collective-bargaining agreements with the employer covered the carpenters and painters of the lumberyard/building supply dealer and its operating division. According to the unions, all the companies constituted a single employer and the carpenters

and painters were part of the same bargaining units. The employer filed a unit clarification petition, seeking to have the Board find that that the unions' bargaining units did not include carpenters and painters employed by the lumberyard/building supply dealer and its operating division because all the companies were not a single employer and because the employer's carpenters and painters did not share a community of interest with those employees of the lumberyard/building supply dealer and its operating division. Relying upon *Union Electric*, supra, the Board held, "These are issues which fall outside the scope of a unit clarification proceeding." Id at 1305. I conclude that the Board's holding in *Al J. Schneider* requires that the instant petition be dismissed since the Board will not permit the issue of single employer/alter ego to be litigated through a unit clarification proceeding. My conclusion is strengthened by the previous assessment that the evidence previously presented failed to establish that the Employer and The Roofing Company have operated as alter egos.

In view of the foregoing facts and law, I conclude that there is no basis to grant the clarification of the unit sought by the Employer through its petition or to proceed to a hearing on the petition. Accordingly, I shall dismiss the petition.

ORDER

IT IS HEREBY ORDERED that the petition in this matter be, and it hereby is, dismissed.

REQUEST FOR REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, N.W., Washington, D.C. 20570. The

Board in Washington must receive this request by December 27, 2002. A copy of the request for review should also be served on the Regional Director of Region 28.

Dated at Phoenix, Arizona, this 13th day of December 2002.

/s/ Michael J. Karlson
Michael J. Karlson, Acting Regional Director
National Labor Relations Board – Region 28

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